WHAT FORM OF WORKINGMEN'S ACCIDENT INSURANCE SHOULD OUR STATES ADOPT?

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One year ago Prof. C. R. Henderson read a paper before the American Association for Labor Legislation in which he told of the educational endeavors of the Illinois Insurance Commission. Such has been the progress in public opinion that today we may take for granted the desirability of accident insurance and ask,—What form of law should our legislatures adopt? I shall attempt to answer that question, especially with reference to conditions in Wisconsin, not with the thought that the answer is in all respects correct, but with the hope that the discussion which follows will be focused upon certain difficult points.

In order, however, to justify the plan to be submitted, I think it may be well to summarize the arguments which may be adduced in favor of a system of accident insurance for workingmen, and without dwelling on them at length for the reason stated.

1. One of the strongest arguments is that such a system would be of great assistance in the prevention of accidents, both because of the full knowledge we should get about accidents, and because the administrative machinery of a system of insurance can do much to prevent them. Note, for example, that the rules of the accident fund of the South Metropolitan Gas Company of London give as the objects of that fund,—first, prevention, and secondly, compensation. In bold faced type, we read:

"Prevention is the chief object. 'Prevention is better than cure'. How poor a substitute for prevention is money compensation. The directors hope, with the hearty coöperation of all officers and workmen, to reduce accidents to the smallest possible number. All are requested to exercise all possible care and forethought, and to report without loss of time, any defects in plants or appliances to the foreman in charge of the work or to the engineer of the station.

"The directors thankfully acknowledge this coöperation in the past, for since this scheme was started in 1897 the proportion of accidents per 1000 subscribers to the fund has been greatly reduced, as is proved by the following figures:

1898.....	82 per 1,000	1903.....	56 per 1,000
1899.....	76 " 1,000	1904.....	50 " 1,000
1900.....	71 " 1,000	1905.....	44 " 1,000
1901.....	64 " 1,000	1906.....	37 " 1,000
1902.....	52 " 1,000		"

In this particular accident fund, the device of a jury of workmen to investigate each accident, and the grading of the workmen's contribution at each station according to the number of accidents in that station, are thought to work toward prevention.

It appears, therefore, that these two objects are not wholly distinct, and we may legitimately mention the desirability of preventing accidents as one of the strong arguments in favor of a system of compensation, even though more direct ways of prevention are also desirable.

2. The wasteful character of our system of damages for negligence is another important consideration. Take an illustration from the Wisconsin Supreme Court cases of this year. A man was severely injured for life by falling into a trench filled with hot water. The damages were $6500, of which the sum of $3500 was paid to his attorneys, and it is said that his expenses due to the acci-

dent are about equal to the balance. This case did not determine any important point of principle. The fact that the man was severely injured while at work was not disputed. The legal contest cannot be said to have served any good purpose. This case is typical, not of any rapacity on the part of lawyers, for such cases may require much work, but of a fault inherent in the system.

Another evidence of waste in our present system is found in the financial statements of the liability insurance companies. In 1907, according to their report to the Wisconsin Insurance Commissioner, about thirty-eight per cent of the premium was paid for losses, although this covers other forms than employers' liability insurance. In all of their business the casualty companies report commissions and dividends as being about three-fourths as much as their losses paid. These facts are not a criticism of the financial management of those companies, nor proof that they are not to some extent beneficent social institutions. The question is simply whether we cannot devise a better system.

3. The present system is unjust because there is no pretense of distributing damages according to needs or merit. The general rule in fatal or serious cases is to pay the smallest amount that will bring a release.

4. The present system undoubtedly creates ill-feeling between employers and employed. The principle of, get what you can out of the employer in case of an accident, makes each side suspicious of the other. I have in mind one workman whose hand was injured in a Milwaukee factory who said, "My employer kicks every time I come around and ask him for five dollars." Contrast this with the German system, where the employee receives from the post office his regular allowance as a matter of right.

5. To some extent industrial accidents necessitate charity. If people must be supported anyhow, it would seem better to give a definite right to a payment than to give the money in the form of a dole.

6. A system of workmen's insurance would undoubtedly relieve the courts of some vexatious litigation. The Supreme Court of Wisconsin had in 1907 about eighteen cases resulting from accidents to workmen. There would, it is true, be litigation under any system, but an insurance law undoubtedly would be more easily interpreted than the law of negligence, because the statement of facts would be subject to less dispute.

This bundle of arguments, with prevention, economy, and justice as the leading ones, is sufficient to constitute a cause for action, and we may proceed to take up specific plans of procedure; but before descending to details it may be well to consider some of the difficulties involved.

DIFFICULTIES INVOLVED.

1. We are confronted at the outset with the alternative of adopting a compulsory or a voluntary system. Some form of compulsory liability or insurance system with optional features certainly is the rule among nations that have legislated in this matter. Perhaps a distinction should be made between a compulsory and an obligatory system. An obligatory system imposes a duty to make provision in case of accident but leaves it optional how that obligation shall be met, whereas a completely compulsory system would make insurance compulsory and leave no option as to the method of insurance. This suggests the German distinction between *Versicherungszwang* and *Zwangsversicherung*.

The Illinois Commission plan is an example of a purely voluntary system. It simply says to the employer and

employees, "You may make a contract whereby the employer insures the workman and the workman agrees to give up his right of suit". We cannot point to any successful experience under such a plan. In Massachusetts the right of contracting out was given in May, 1908, but no action had been taken under the law up to December 1, 1908. Under all of the conditions, it may prove wisest to follow this plan, but it would be a confession of a weakness in our governmental system, for, in view of European experience, there can be little doubt but that we shall ultimately have a comprehensive system of workmen's insurance.

The plan which I shall submit to you makes some form of insurance practically obligatory, but leaves such options that it cannot be in any sense oppressive. An obligatory system has the advantage that it includes backward, reckless, and unintelligent employers as well as the public-spirited ones, and it includes the thriftless as well as the thrifty worker. It would give a broader basis for equalizing the shocks,—that is, with a large number of persons insured, there would probably be more regularity in the accident rate, and probably a smaller expense rate. It would help also in getting complete statistics, which is of the utmost importance for intelligent action in the future. I should be disappointed if our states adopted systems which did not permit of our having as complete statistics as are issued by the German government on this subject.

2. But what will the courts say about an obligatory system? Our courts are often represented as being opposed to progress. Perhaps there has been in the past some justification for this. The courts were under no compulsion, for example, except that of their own inclinations, to develop the fellow servant doctrine and the doctrine of

the assumption of risk, so far as these apply to dangerous industries. These doctrines give a clear illustration of legislation by the courts, and the trouble with this judicial legislation is that it has developed piece-meal, decision by decision, each step making it harder to retreat in order to make the theory square with the facts. The courts have assumed that certain things were implied in the wage contract, assumptions which were reasonable in employments not of a dangerous character, but unreasonable in modern, complicated, dangerous occupations. If the courts had been open to progressive ideas, they might have modified the law by recognizing a trade risk and the fact that an employer incurred some responsibility when he engaged in an enterprise which, assuming that degree of care which may be expected of human nature, was bound to result in so many killed and injured per 1000. They might, if they had taken account of economic facts, and had not been so much under the spell of *stare decisis,* have assumed that a "free and equal" workingman, before entering a dangerous employment, would contract with his employer that the employer was to assume part of the risks of the business.

But yet the courts have been somewhat too much criticised. They are the interpreters of our constitutions, and our constitutions may be the real barriers to progress. The courts have fully recognized that the right of private property, the right of free contract, and the right to engage in business enterprises, are not absolute, but are subject to considerations of public welfare. Show conclusively that a public evil exists, show conclusively that you have a remedy that is adequate and sensible and not too drastic, and you will find that the courts will not stand in the way unless some specific provision of the constitution is violated by your plan. The plan which I shall sub-

mit to you is a small regulation of property and of contracts, designed to be reasonable and practical, which contains nothing of class favoritism or confiscation, and which is to remove evils which in the words of an English statesman one may venture to call a great scandal. While some doubt as to the constitutionality will attach to any compulsory system, it is worth while to bring the matter squarely before our courts before accepting an unsatisfactory voluntary system.

3. There is the further difficulty of enumerating the industries to which such a system should apply. A voluntary system might avoid this difficulty, but a compulsory system cannot escape it. The English law makes short work of this perplexity by including all employments. In other countries we do find an enumeration of various industries to which the insurance system is to apply. Can a reasonable classification of industries be found according to which you can say to this class the insurance system shall apply, and to that class it shall not apply? If a man is injured in an employment where the accident rate is one per 1000, should he not receive compensation as much as if the rate in his industry were fifty per 1000? Again, if you compensate a man injured in a planing mill, why not also make your system apply to the farm hand killed by a corn shredder? This is a point of great difficulty.

It should be remembered that the problem before us now is not that of insuring workingmen against all injuries, for a good many are injured while not at work. That is a distinct problem. The idea is to cover the *extra hazard* due to their occupations, for it is this extra hazard which gives rise to the peculiar evils which we seek to remedy. It seems proper to make the basis of classification the *existence of a clear trade hazard.* We are all exposed to some risk of accident. Office workers, for ex-

ample, have their accident rate, but they have no occupational hazard for accidents. For some kinds of light manufacturing there might be practically no such special risk. It would be a matter of statistical detail to determine what occupations have such a special hazard. A satisfactory law should state clearly the principle of classification, but make the inclusion of special kinds of enterprises a matter of statistical detail. It would not be conferring legislative power on a commission if the inclusion or exclusion of an industry were made to depend on the ascertaining of a fact,—that is, whether the accident rate was more or less than the standard.

But it would be desirable to make some broad exceptions to this principle. Agricultural laborers should perhaps be excluded as being a class by themselves. There is more casual labor; more personal relations exist between employer and employed. Personal vigilance perhaps counts for more, as farming is a small scale industry. The large number of farmers would make administration difficult; and, finally, the evils constituting a cause for action have not been given prominence by cases arising out of farm accidents. Possibly it would be desirable to include the operations of dangerous forms of agricultural machinery where mechanical power is used.

4. Should the employer bear the expense alone or should the employee also contribute? I think, that under conditions existing in this country, we must decide in favor of a joint contribution. This would give both parties a financial interest in good administration. It would free the system from the charge of being a class measure, and would harmonize with the legal theory of the equality of men. Considering interstate competition, an adequate insurance might be a burden to the employer if he bore the expense alone. There is good reason to believe that

the scale of payments in the English act of 1897 could easily be borne by the employer. But that scale was hardly adequate. It did not provide for full medical aid.

5. How should the money be collected and administered? Some machinery is evidently necessary. The English method utilizes the machinery of the private liability companies. The German plan is to make employers' associations do much of the work. Both seem hardly applicable to our conditions. The waste of the private liability companies is one of the things we wish to avoid. Dividends and commissions have no place in a system of workingmen's insurance, and, on the other hand, it is questionable whether our employers would care to take the trouble to administer the German system properly, and whether we could vest employers' associations with the authority to impose fines and issue orders as the German associations do. To create private agencies and then to supervise them by an additional governmental machinery seems unnecessarily cumbersome.

The plan submitted provides for a system of direct state administration, with the option of insurance by employers' associations or other insurance agencies. A state like Wisconsin is not too large an area for one administration. The advantage lies in the simplicity and in making use of methods with which employers are already familiar. The plan does not preclude utilizing associations and committees of employers and employees to assist in the administration.

6. The prevention of malingering is an important consideration. That is not so large a problem in accident as in sick insurance, but it is something you have to fight against. A state administered fund would have in this respect to adopt the same method used by the liability companies,—the appointment of physicians and agents whom

it can trust to examine each case; but in addition to this the coöperation of employers and workmen can perhaps be enlisted by making it to their interest to reduce the number of claims by making the premium vary according to the accidents compensated in each establishment within certain limits.

7. How can damage suits be obviated? The English method does not try to do so directly but gives the workman the option to take more certain compensation, and the insurance company protects the employer in either event. But in the plan submitted the aim is to make these suits so unusual (by limiting them to cases of gross and flagrant negligence or wilful misconduct) that he need not insure himself against this contingency. To make this exemption fair from the standpoint of the workman, the employer should not, if such a suit be brought, be allowed to avail himself of the defense of contributory negligence except in cases of gross and flagrant negligence or wilful misconduct on the part of the workman injured. The plan submitted is as follows:

There should be a Board of Industrial Insurance Commissioners, the constitution of which is a matter of detail. This board would have the power to issue danger licenses to employers who wish to engage in dangerous employments, a license fee being charged therefor, with fine for refusal. Any employer having such a license would not be liable to a damage suit on account of industrial accidents happening in his establishment unless he was guilty of gross and flagrant negligence or wilful misconduct. The license fee would be graded according to the character of the industry, and according to the wage bill, with readjustments according to subsequent experience. The employer would have the right to deduct a sum equal to one-half the license fee from the wages

which he pays, this being assumed to be a part of every wage contract, unless written notice was given to the contrary both to the employer and to the board of insurance commissioners. When an employee gives such notice, his possible benefits would be diminished, as would also the license fee of the employer. The reason for putting the matter in this way is to include all employees unless they have a good reason for withdrawing. Under a voluntary system a workman must have foresight enough to enter an insurance scheme; under the plan proposed, he would be automatically included unless he takes the initiative in getting out. Thus there would be no danger of infringing his liberty, and in any case, he would still be entitled to a small compensation in case of accident. But if the employer had paid his share of the license fee on account of such employee, he would still not be liable to a suit except for gross and flagrant negligence or wilful misconduct. This is less favorable to the workman than the English law. If it is not thought favorable enough, matters should be balanced up, not by making damage suits easy, but by asking the workman to pay say one-third instead of one-half. In the exceptional cases of suit against the employer, which it is thought would be so unusual that he need not insure himself against that contingency, his defense would be weakened by abolishing the doctrine of the assumption of risk and the fellow-servant doctrine.

Instead of paying a license fee, the employer might obtain his license by furnishing proof that he had insured his men with some company or organization, the policy being like the standard policy prescribed in the statute, or equivalent to it.

The license fees would constitute a fund, out of which full medical aid and weekly or monthly benefits would be

paid. In general the cost would be twice as great as the English scale of 1897, the share of each party being about equal to present rates for liability insurance.

The board of insurance commissioners would have to employ administrative agents and medical inspectors as the liability companies do now. This does not mean that the state would be in the insurance business. The fund would not only be distinct from other revenues, but probably could not even be guaranteed by the state.

As already indicated the employments covered would be those which, according to the best statistics available, have an accident rate higher than that of office workers or retail mercantile employments, where there is practically no occupational hazard. Possibly farming, except where power machinery is employed, should be expressly exempted, and also persons engaged in interstate commerce.

The advantage of the plan here outlined lies in its simplicity and definiteness. The employer pays his license fee, and he gets protection which he does not have today even when he carries liability insurance, for frequently the damages allowed are greater than the limit specified in the policy. On the other hand, the workman or his dependents get a certain payment. State supervision will guarantee fairness and justice in the working of the system.

The plan is offered as simply one way out of a difficulty. Further discussion may show a better way.

An Outline of a Bill.

To create a board of industrial insurance commissioners, to establish an accident fund, to provide for licensing employers, and to amend the statutes relating to the liability of employers for damages to injured employees.

Section 1. *Board of Industrial Commissioners.* The

Insurance Commissioner, the Commissioner of Labor, and the Attorney General are created a Board of Industrial Insurance Commissioners to manage the accident fund. (The constitution of this commission is a matter of detail; it may be desirable to confine it to one department, or to create a new commission, or to have an incorporated body of a quasi public character, for which there would be precedent in the Horticultural Society and others in this state.) The state could contribute a definite amount annually for the expenses of this board.

Section 2. *Danger license.* After a specific date, no person shall engage in the employments specified in section 11 without a license from the board of insurance commissioners. This license must be renewed annually. Refusal to apply for a license or to comply with conditions necessary to obtain same, or to renew same annually, would subject one to a fine, graded according to the number of persons employed, such fines being paid into the accident fund, provided for later.

Section 3. *License fees—how determined.* It would be the duty of the insurance commissioners to classify the industries covered by the act in detail, according to the dangerous character of the industry. That this is possible is shown by the fact that the liability companies have done it. The fee of each employer would at first be determined by his classification and wage bill, but if subsequent experience showed that his establishment caused fewer accidents to be compensated than indicated by the accident rate of his class, his fee might be reduced not more than fifty per cent. This reduction would thus not be dependent on political or other favoritism, but according to scientific accounting. The general level of the fees are determined by the benefits granted in section 8, those benefits being arranged on the supposition that the fee

would be about twice the existing cost of employers' liability insurance, one-half being paid by the employee as provided in the next section.

Section 4. Every contract whereby an employee agrees to work for an employer in the employments specified in section 11 shall be understood to authorize the employer to withhold from wages to be paid for such employment as much as one-half the amount which the employer must pay to secure a license from the board of insurance commissioners, unless the employee gives written notice to the employer and to the board of insurance commissioners to the contrary. Any employee who gives such notice shall be entitled to only one-half the benefits specified in section 8, and the employers' license fee shall be diminished accordingly.

(The reason for putting the matter in this way is to include all employers unless they have a good reason for withdrawing. Under a voluntary system, an employee must have foresight to enter a scheme; under the plan proposed he is automatically included unless he takes the initiative in getting out. Thus there is no real danger of infringing his liberty. In any case, he would still be entitled to some definite compensation in case of accident.)

Section 5. *Licensed employer not liable—exception.* Any employer who has obtained a license according to section 2 shall not be liable to prosecutions for damages to employees on account of accidents for which the injured employee is entitled to compensation under section 8, unless the proximate cause of the accident is the gross and flagrant negligence or the malicious or wilful misconduct of the employer, or unless the employer has knowingly refused to comply with the reasonable orders of a factory inspector which might have prevented such accident.

(This practically exempts the employer. It is less favorable to the workman than the English law. If it is not thought favorable enough, matters should be balanced up, not by making damage suits easy, but by asking the workman to pay say one-third instead of one-half of the license fee.)

Section 6. *Liability of employers in case of gross and flagrant negligence or wilful or malicious misconduct.* In an action brought by an employee against his employer in the exceptional cases provided for in the preceding section, the contributory negligence of the employee involved in his voluntarily entering into a dangerous employment shall not be a bar to recovery. Nor shall a slight inattention or mistake on the part of the workingman injured or any negligence on the part of a fellow servant be a bar to recovery. But gross and flagrant negligence or malicious or wilful misconduct, including repeated disobedience to reasonable rules for the conduct of the work which the employer has attempted to enforce, shall be a valid defense for the employer.

Section 7. *Diminished benefits to employees who resort to a suit.* Any employee who brings a suit against his employer for damages on account of an accident, and who otherwise would be entitled to full benefits under section 8 of this act on account of such accident, shall forfeit such part of such benefits as the employer's contribution of the premium paid on account of such employee. If without such suit he would be entitled to only half benefits because he has made no contributions to the employers' license fee, he shall receive no benefits.

Section 8. *Benefits to injured or their dependents.* When an employee to whom this act applies as specified in section 11 is injured while at work for his employer, and as a result of such work, he or his heirs shall, regardless of negligence, be entitled to the following benefits to be

paid out of the accident fund created by this act, except that no benefits shall be paid for injuries which have been intentionally self-inflicted, and unless the benefits are modified according to section 4 or section 7: (1) *in case of death,*—funeral and other expenses due to the accident, and a pension to widow or dependents for a period of ten years, equal to half wages, with a possible commutation to a lump sum; (2) *in case of incapacity,*—full medical aid and as much as one-half wages during incapacity, the exact amount depending on the degree of incapacity.

Section 9. *Payment of benefits.* (1) The board of industrial insurance commissioners shall appoint such administrative agents, medical inspectors, and make such necessary regulations that, when an accident happens that is covered by this act, the benefits may be paid promptly. (2) The said board may refuse to pay the benefits if the person refuses to submit to a medical examination to determine the degree of incapacity or if it discovers intent to defraud the accident fund.

Section 10. *Accident Fund.* The license fees and fines provided to be paid by this act shall constitute an accident fund, in the custody of the State Treasurer, payments from which would be made on the order of the Board of Insurance Commissioners. Provision would have to be made for the disposition of a possible surplus or the covering of a possible deficit. The latter might be done by authorizing a special assessment upon licensed employers, or by requiring an entrance fee until a guarantee fund had been accumulated, but the state could not guarantee the fund directly. Some of the general expenses of administration could be done by direct appropriation.

Section 11. *License may be obtained by substituting other schemes.* If any employer employing an average

of 1500 men for five years preceding the enactment of this law, or any association of employers who have collectively employed an average of 1500 men for five years preceding the enactment of this law, shall organize a voluntary insurance organization which will guarantee to the men in his or their employ benefits fully as large and fully as advantageous in method of payment as the benefits specified in this act, and at no greater cost to the employees, or if an employer shall prove that he has purchased a policy from an insurance company, which policy guarantees benefits fully equal in amount and method of payment to those specified in this act, accident licenses shall be issued to such employer or employers without payment of a license fee into the accident fund.

(Further provision would have to be made for complete publicity and statistical reports in the form prescribed by the board of insurance commissioners.)

Section 12. *Employments covered.* The employments covered would include all that have a clear trade hazard, except farming and except persons engaged in interstate commerce.

Section 13. *Settlement of disputes.* If the amount of compensation granted by the board is believed to be erroneous the employee or employer may appeal to a board of arbitration, previously organized in each locality. From this board an appeal could be taken to the insurance commissioners and thence to the courts if the decision was not satisfactory to all concerned.